RESTRICTIVE TRADE PRACTICES COMMISSION

REPORT

Concerning the Distribution and Sale of Gasoline in the Toronto Area (Alleged Price Discrimination - Supertest Petroleum Corporation, Limited)

DEPARTMENT OF JUSTICE
OTTAWA

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1961

RTPC No. 13
(Series begins 1959)

RESTRICTIVE TRADE PRACTICES COMMISSION

REPORT

CONCERNING THE DISTRIBUTION AND SALE OF GASOLINE IN THE TORONTO AREA (ALLEGED PRICE DISCRIMINATION - SUPERTEST PETROLEUM CORPORATION, LIMITED)

COMBINES INVESTIGATION ACT

Ottawa
1961

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ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1961

Price 50 cents Cat. No. J53—61/13

RESTRICTIVE TRADE PRACTICES COMMISSION

C. Rhodes Smith, Q.C., M.A., LL.B., B.C.L.
Chairman

Pierre Carignan, Q.C., M.A., LL.L.
Member

A. S. Whiteley, B.A., M.A.
Member

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RESTRICTIVE TRADE PRACTICES COMMISSION

Ottawa, April 11, 1961.

Honourable E. Davie Fulton, P.C., Q.C., M.P.,
Minister of Justice,
Ottawa.

Sir:

I have the honour to submit to you herewith the report of the Restrictive Trade Practices Commission dealing with instances of alleged price discrimination in the sale of gasoline in the Toronto area by Supertest Petroleum Corporation, Limited.

The matter was brought before the Commission by the submission of a statement of the evidence obtained in the inquiry by the Director of Investigation and Research under the Combines Investigation Act and has been dealt with in accordance with the provisions of sections 18 and 19 of the Act.

Argument on the Statement of Evidence was heard by the Commission in proceedings before Mr. A.S. Whiteley and Mr. Pierre Carignan, Q.C., members of the Commission, at Ottawa on June 27, 1960. At these proceedings Messrs. J.J.Quinlan and A.C. Whealy appeared on behalf of the Director of Investigation and Research and Mr. R.W. Mitchell, Q.C. appeared on behalf of Supertest Petroleum Corporation, Limited.

Yours faithfully,

(Sgd.) C. Rhodes Smith

C. Rhodes Smith
Chairman

94972—2

CONTENTS

			Page
CHAPTER I	-	INTRODUCTION	1
	1.	Reference to the Commission	1
	2.	Conduct of the Investigation by the Director	1
	3.	Allegations Made in the Statement of Evidence.	2
	4.	Hearing Before the Commission . . .	5
	5.	Position Taken by Supertest Petroleum Corporation, Limited with Respect to the Allegations .	6
CHAPTER II	-	BUSINESS RELATIONSHIP BETWEEN SUPERTEST PETROLEUM CORPORATION, LIMITED AND MR. J.H.L. HEARL AND BILL BARTER MOTORS LIMITED	9
	1.	Supertest Petroleum Corporation, Limited	9
	2.	Mr. J.H.L. Hearl	9
	3.	Bill Barter Motors Limited.	12
CHAPTER III	-	SUPERTEST PRICING POLICIES. . . .	17
	1.	Temporary Local Competitive Assistance	17
	2.	Prices and Quantities of Gasoline Sold to Mr. Hearl and Barter Motors	26
CHAPTER IV	-	RETAIL PRICES OF GASOLINE AT HEARL'S SERVICE STATION AND BARTER MOTORS	32
	1.	Before the Price War	32
	2.	During the Price War	35
	3.	After the Price War	38

94972—2½

Page

CHAPTER V - THE RELATIONSHIP BETWEEN BARTER MOTORS AND MR. HEARL'S BUSINESS 39

1. Proximity of Barter Motors and Hearl's Service Station 39

2. Are Hearl's Service Station and Barter Motors Complementary? . 41

3. The Competitive Relationship between Mr. Hearl and Barter Motors . . 44

CHAPTER VI - CONCLUSIONS AND RECOMMENDATION. 49

1. Availability of Temporary Local Competitive Assistance 49

2. The Special Allowance Given by Supertest to Barter Motors . . . 49

3. Recommendation 56

TABLES

Page

1. Quantities of Gasoline Delivered to Mr. Hearl and Barter Motors, by Months, 1956-60 27

2. Premium and Regular Grades of Gasoline Sold to Barter Motors and Mr. Hearl, March 18 to July 25, 1959 29

3. Retail Prices of Gasoline in Mid-April 1959 32

4. Retail Prices of Regular Gasoline during the TLCA Periods 37

5. Retail Prices of Premium Gasoline on July 13, 1959 . 37

6. Retail Prices of Gasoline after the Price War 38

7. Deliveries of Regular Gasoline to Barter Motors and Mr. Hearl and Differences in Retail Prices Charged by Both Outlets for Such Gasoline 48

8. Breakdown of Cost per Gallon of Gasoline Delivered to Mr. Hearl, 2151 Jane Street at Wilson, Downsview, Ontario 51

9. Breakdown of Cost per Gallon of Gasoline Delivered to Barter Motors, 1651 Wilson Avenue, Downsview, Ontario 52

CHAPTER I

INTRODUCTION

1. Reference to the Commission

This inquiry, which was conducted by the Director of Investigation and Research*, was brought before the Restrictive Trade Practices Commission** by the submission of a statement of the evidence obtained in the inquiry pursuant to section 18 of the Combines Investigation Act***. A copy of such statement, dated May 4, 1960, was also sent by the Director to Supertest Petroleum Corporation, Limited against whom allegations were made therein. In the Statement and in this report Supertest Petroleum Corporation, Limited is sometimes referred to as Supertest.

2. Conduct of the Investigation by the Director

As a result of a complaint received from the Ontario Retail Gasoline and Automotive Service Association, the investigation was begun on the initiative of the Director under section 8(b) of the Combines Investigation Act****.

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* Hereinafter called the Director.
** Hereinafter called the Commission.
*** Hereinafter called the Act.
**** Prior to its 1960 amendment, section 8 read as follows:

> "8. The Director shall
> (a) on application made under section 7,
> (b) whenever he has reason to believe that section 32 or 34 of this Act or section 411 or 412 of the Criminal Code has been, is being or is about to be violated, or
> (c) whenever he is directed by the Minister to inquire whether any of the sections mentioned in paragraph (b) has been, is being or is about to be violated,
>
> cause an inquiry to be made into all such matters as he considers necessary to inquire into with the view of determining the facts. 1952, c. 39, s. 2."

94972—3

During the course of the inquiry, the Director asked for and obtained a return of information by way of answers to a questionnaire which he sent to Supertest Petroleum Corporation, Limited under section 9 of the Act.

The Director also applied to a member of the Commission for permission to examine witnesses under oath as provided in section 17 of the Act. Orders to this effect were issued and sworn oral evidence was taken in Toronto from Messrs. William John Barter, President of Bill Barter Motors Limited and James Harold Hearl. Whenever reference is made in this report to the transcript of the evidence taken during these examinations, it will be made as follows: (Evidence, p. . . .).

During the course of these examinations, the following exhibits were filed:

Exhibit S-1 - Letter, dated January 27, 1958, from S.H. Marshall of Supertest to W.J. Barter, to which is attached:

(a) Retail Dealer Agreement, dated December 19, 1957, between Supertest and W.J. Barter;

(b) An Agreement, dated January 17, 1958, between Supertest and William J. Barter.

Exhibit S-2 - Memorandum letter, dated December 14, 1959, from J. Hancock of Supertest to Bill Barter Motors.

3. Allegations Made in the Statement of Evidence

The concluding section of the Director's statement contains the following summary and allegations:

"37. The evidence obtained in this inquiry discloses that the retail gasoline outlets operated by Barter Motors and J.H.L. Hearl respectively were both situated approximately 400 yards apart on Wilson Avenue in the Downsview area of metropolitan Toronto. The evidence of both Mr. Barter and Mr. Hearl shows that the two outlets were in competition with each other in the retail sale of Supertest gasoline.

38. The evidence also discloses that since at least February 1958 Supertest has granted a special two cents per gallon discount off the tank wagon price on both grades of gasoline to Barter Motors. Because Barter Motors is an independently owned and operated gasoline retail outlet and was free to choose what brand it would sell, various choices of brands were available to it at the time it opened its service station in the latter part of 1957 or early 1958. In order to obtain this retail location as an outlet for its brands of gasoline, Supertest agreed to sell Barter Motors both grades of branded gasoline at a two cents per gallon discount off the tank wagon price. J.H.L. Hearl, being a lessee dealer, did not receive such a discount but is required to purchase his petroleum products exclusively from Supertest.

39. During periods when no 'price war' was in progress, Barter Motors was able to sell gasoline at a lower retail price than could Mr. Hearl. This resulted in Barter Motors selling a large volume of regular grade gasoline which W.J. Barter felt would not be sold had it been selling at the same price as Mr. Hearl. Mr. Hearl's evidence indicates that, as a result of the price differential enjoyed by Barter Motors, he lost sales to it after it commenced operations. Although Barter Motors also was able to sell premium gasoline at a lower price than Mr. Hearl, its volume was not similarly affected and Mr. Hearl consistently sold a larger volume than Barter Motors.

40. The evidence also discloses that from time to time during the existence of retail gasoline 'price wars' in the Toronto area in 1959, it was the policy of Supertest to offer temporary local competitive allowances off its basic tank wagon price for regular gasoline to its retail dealers to enable them to meet the price of competing retail dealers. TLCA* on premium gasoline, however, was offered only for a brief period in July 1959. In periods other than 'price war' periods, temporary local competitive allowances either are withdrawn or substantially reduced.

41. The TLCA on regular gasoline referred to in paragraph 40 was offered to, and refused, by Barter Motors during the 'price war' which existed in the Toronto area in 1959. The

---

* Temporary Local Competitive Allowances.

reason for refusal was that Barter Motors was unwilling to jeopardize its two cents per gallon discount by accepting such an allowance.

42. When, after June 16, 1959, Barter Motors lost its price advantage over Mr. Hearl due to TLCA granted to him, its sales dropped while Mr. Hearl's increased, both substantially. Thus, because Supertest under its TLCA policy lowered Mr. Hearl's buying price to a point below that of Barter Motors, his temporary price advantage caused, partially at least, a substantial loss of sales to Barter Motors, from 1,200 gallons per day to approximately fifty to sixty gallons per day according to Mr. Barter's evidence.

43. As indicated in paragraph 41, Barter Motors was offered TLCA on regular gasoline by Supertest but refused it. This offer, however, as in the case of Mr. Hearl, was made on the basis that if competitive prices were met, the dealer would be sold the gasoline at a price which would allow him a gross margin of five cents per gallon. Section 412(1)(a) of the Criminal Code (S.C. 1953-54, C. 51) makes no provision for the imposition by a seller of terms of purchase on a buyer beyond purchase of like quality and quantity for a purchaser to be entitled to the same net price as his competitors.

44. It is alleged that Supertest Petroleum Corporation, Limited between March 16 and July 12, 1959, both inclusive, was a party to the sale of premium gasoline that discriminated, to its knowledge, against a competitor of the purchaser, namely James Harold Leonard Hearl, in that a discount, rebate, allowance, price concession or other advantage was granted to Bill Barter Motors Limited over and above any such discount, rebate, allowance, price concession or advantage, available at the time of such sale to James Harold Leonard Hearl in respect of the sale of gasoline of like quality and quantity, within the meaning of section 412 of the Criminal Code.

45. It is further alleged that Supertest Petroleum Corporation, Limited between March 16 and April 15, 1959, both inclusive, and between May 8 and June 15, 1959, both inclusive, was a party to the sale of regular gasoline that discriminated, to its knowledge, against a competitor of the purchaser, namely James Harold Leonard Hearl, in that a discount, rebate, allowance, price concession or other advantage was granted to Bill Barter Motors Limited over and above any such discount, rebate, allowance, price concession

or advantage, available at the time of such sale to James Harold Leonard Hearl in respect of the sale of gasoline of like quality and quantity, within the meaning of section 412 of the Criminal Code.

46. It is further alleged that Supertest Petroleum Corporation, Limited between April 28 and May 2, 1959, both inclusive, and between June 16 and July 20, 1959, both inclusive, was a party to the sale of regular gasoline that discriminated, to its knowledge, against a competitor of the purchaser, namely Bill Barter Motors Limited, in that a discount, rebate, allowance, price concession or other advantage was granted to James Harold Leonard Hearl, over and above any discount, rebate, allowance, price concession or advantage available at the time of such sale to Bill Barter Motors Limited, in respect of the sale of gasoline of like quality and quantity, within the meaning of section 412 of the Criminal Code.

47. It is further alleged that the discount, rebate, allowance, price concession or other advantage referred to in paragraphs 44, 45 and 46 was granted as part of a practice of discriminating within the meaning of section 412(2) of the Criminal Code."

4. Hearing Before the Commission

On receipt of the Statement of Evidence, the Commission, in accordance with the provisions of section 18 of the Act, by an Order dated May 18, 1960, fixed Monday, June 27, 1960 at the hour of 10 o'clock in the forenoon, in Room 303, Justice Building, Wellington Street, in the City of Ottawa, in the Province of Ontario, as the date, time and place at which argument could be submitted by or on behalf of the Director in support of the Statement of Evidence and at which persons against whom any allegation is made therein would be allowed full opportunity to be heard in person or by counsel.

At the hearing, which was held before Mr. A.S.Whiteley, and Mr. Pierre Carignan, Members of the Commission, on June 27, 1960, the following appearances were entered:

MR. J.J.QUINLAN, and) MR. A.C.WHEALY)	for Director of Investigation and Research
MR. R.W.MITCHELL, Q.C.	for Supertest Petroleum Corporation, Limited.

Before argument was heard by the Commission, certain exhibits numbered H-1 to H-9 were received and two witnesses were examined: Messrs. Stewart H. Marshall, retail sales manager of Supertest Petroleum Corporation, Limited and Kenneth R. Johnston, petroleum marketing consultant of Kenneth R. Johnston and Associates Limited. Whenever reference is made in this report to the transcript of the hearing before the Commission, it will be done as follows: (Hearing, p. . . .).

5. Position Taken by Supertest Petroleum Corporation, Limited with Respect to the Allegations

In giving notice of the hearing, the Commission, in accordance with its usual practice, had requested Supertest Petroleum Corporation, Limited to submit, in advance of the hearing if possible, a statement indicating the position taken with respect to the facts and conclusions set out in the Statement of Evidence.

The brief submitted by Mr. R.W. Mitchell, Q.C., on behalf of Supertest Petroleum Corporation, Limited, reads as follows:

> "1. Except as hereunder specifically questioned or denied, Supertest Petroleum Corporation, Limited, (hereinafter called Supertest), accepts the evidence of William John Barter, (hereinafter called Barter) and James Harold Leonard Hearl, (hereinafter called Hearl). The statements made by Barter and Hearl, with which Supertest takes issue are as follows:-
>
> (a) Supertest denies that in granting T.L.C.A. a condition was imposed which would restrain Hearl from reducing his selling price below the prevailing price. See Page 6 of the Statement of Evidence.
>
> (b) The Statement of Evidence is inconclusive as to whether or not Hearl was supplied on a consignment basis. In order to clarify the situation, it can be stated that he was never supplied on consignment.
>
> (c) Supertest questions the evidence of Barter as recorded on Page 9 of the Statement of Evidence. Supertest denies that it was

setting the selling price of gasoline and that Barter had to follow suit.

(d) Supertest denies that Hearl lost gallonage as a result of the action of Supertest in selling to Barter. See Statement of Evidence Page 13.

(e) Supertest denies that acceptance of T.L.C.A. by Barter would have jeopardized his discount. See evidence of Barter on Page 7 and Summary of Allegations Paragraph 41 on Page 19.

(f) Supertest denies that Barter and Hearl were in competition with each other. Their operations were of a different nature and different facilities were provided to the public.

In all other respects Supertest accepts the evidence submitted by Barter and Hearl.

2. In support of the statements set forth in Paragraph 1. hereof and to offer evidence supplementary to that given by Barter and Hearl, Stewart H. Marshall, Retail Sales Manager of Supertest will be called as a witness. He will give evidence relative to:-

(a) The sales of Barter and Hearl.

(b) The nature of the land, buildings and equipment of each.

(c) Land and building assessments and taxes on the Hearl property.

(d) Rents paid by Hearl to Supertest.

(e) The comparative costs of supply by Supertest to Barter and Hearl.

(f) The circumstances under which the transaction between Barter and Supertest was entered into.

(g) The facilities provided to the motoring public by Barter and Hearl,
and such further and other matters as Counsel may advise.

3. Supertest accepts the summary of evidence and conclusions drawn therefrom by the Director as set forth in

Paragraphs 37 to 42 inclusive of his Statement of Evidence except insofar as they are called in question by paragraph 1. hereof.

4. Supertest takes issue with and denies the allegations contained in Paragraphs 43 to 47 inclusive of the Statement of Evidence and will submit evidence and argument to establish:-

(a) That Barter and Hearl are not competitors of each other, and

(b) That the price concession granted to Barter was not a discriminatory action against Hearl, and

(c) That Supertest is not engaged in a practice of discriminating within the meaning of Section 412 (2) of the Criminal Code, and

(d) That the Temporary Local Competitive Allowances granted from time to time to Hearl were not discriminatory against Barter.

In support of the foregoing, the aforemention [sic] Stewart H. Marshall and one Ken R. Johnson [Johnston] a Petroleum Marketing Consultant will be called as witnesses.

Dated at London in the Province of Ontario, this 20th day of June, 1960."

CHAPTER II

BUSINESS RELATIONSHIP BETWEEN SUPERTEST PETROLEUM CORPORATION, LIMITED AND MR. J.H.L. HEARL AND BILL BARTER MOTORS LIMITED

1. Supertest Petroleum Corporation, Limited

Supertest Petroleum Corporation, Limited is a distributor of automotive petroleum products. Incorporated under the laws of the Province of Ontario by letters patent dated December 17, 1925, the company has its head office at 245 Pall Mall Street in the City of London in the Province of Ontario.

Bill Barter Motors Limited and Mr. J.H.L. Hearl operate retail gasoline outlets which are supplied with petroleum products by Supertest.

2. Mr. J.H.L. Hearl

Mr. James Harold Leonard Hearl has been a lessee of Supertest since 1947 at 2151 Jane Street, on the southeast corner of Wilson Avenue, in Downsview, in metropolitan Toronto, where he has operated a service station business of which he is the sole proprietor. According to his testimony, he is required by agreement to purchase exclusively from Supertest petroleum products, oil, tires and batteries (Evidence, p. 13). He is also a partner in a fuel oil business operated from the same location (Evidence, p. 12).

According to the evidence of Mr. Stewart H. Marshall, the building on the property leased to Mr. Hearl by Supertest had been constructed originally in 1941 and an addition of a second bay had been made in 1954. He described the facilities at the service station as follows:

> "At the Hearl location we have a two bay building. It is quite large. It is adequate for the lubrication of automobiles plus automobile repairs. There is a sales office, there is a restaurant there, there are living

quarters. Mr. Hearl uses it as a depot for a fuel oil business as well as a towing business. He has at least two or possibly three large wreckers up there and he has, I believe, two large fuel oil trucks apart from the other business."

(Hearing, p. 14)

Later on, he stated:

"If I were to have my choice based on my 15 years experience in the petroleum business I would pick the Hearl property as being the choicest location in that area. It is what we call in the trade the 'right corner'."

(Hearing, p. 17)

The monthly rent charged to Mr. Hearl by Supertest is $300, and before mid-1959 had been $225 for a period of four years (Hearing, pp.16-17). The restaurant and presumably the living quarters are sublet by Mr. Hearl to other persons at rents estimated to be a minimum of $150 a month in the first case and $60 a month in the second (Hearing, p. 15). Property taxes based on an assessment of $12,500 for land and $10,875 for the building amounted to $1,136 in 1957, $1,211 in 1958 and $1,269 in 1959 (Exhibits H-7, H-8).

3. <u>Bill Barter Motors Limited</u>

Bill Barter Motors Limited* is an incorporated company under the laws of the Province of Ontario. Mr. William John Barter is its owner and president. The firm started in business in late 1957 and has a dealership in Mercury, Meteor and Lincoln automobiles and also in Supertest petroleum products.

Barter Motors is classed in the trade as an independent gasoline outlet as it owns the premises on which it operates. Located at 1655 Wilson Avenue, in Downsview, in metropolitan Toronto, these premises offer facilities which were described by Mr. S.H. Marshall as follows:

---

* Hereinafter referred to as Barter Motors.

BY MR. MITCHELL:

"Q. Now, Mr. Marshall, will you describe the nature of the Barter outlet giving us some ideas as to the nature of the land, the buildings and the equipment?

A. Well, Mr. Barter bought this property at a very substantial figure. The vacant property was $85, 000 and his primary interest, as he said to me, was to establish an automobile dealership for the sale of new and used automobiles plus a service repair garage and a wholesale parts business handling Ford parts.

His idea in entering into the gasoline business was he felt it was an adjunct to his main purpose and did not consider it too seriously from the income point of view or the gross return. He set the pumps away off to the side of the property and frankly I wanted them set naturally closer to the building so there would be better service but he said no, he did not want to block off the front of his building and he put the pumps away off to the side in front of the used car lot. It was just an adjunct to his main business, the way he spoke to me.

Q. Would you describe this as a normal retail outlet?

A. No, this is an automobile dealership with the sale of petroleum products very, very small, not even more than about $6, 000 or $7, 000 at the most.

Q. And what are his facilities for lubrication, for example?

A. He has one building there. At the back is the area in which the hoists are located so before you get oil changes or lubrication you have to drive away back to the back of the building which is located on the west side of the lot whereas the pumps are located on the east side of the lot so it does not lend itself to a service station operation. As a matter of fact, as I recall there was an old house that they used as a sales office for used cars and it is sitting away back behind. I believe since that time it has been taken down and a temporary shack built.

. . .

Q. You are familiar with this property, Mr. Marshall?

A. I am.

. . .

Q. Do you know how much Mr. Barter paid for the land?

A. He paid $85, 000 against which he put a $40, 000 privately held mortgage held by a lawyer. That is the statement of assets given to me by Mr. Barter. The initial building was primarily constructed at $80, 000 and that, of course, was inflated greatly before he commenced operations.

Q. What would the investment of Supertest be in that outlet?

A. Approximately $10, 000 is our only investment and that includes pumps, tanks, hoists, air compressor, light standards, the list of utensils for the sale of our products."

(Hearing, pp. 9-10, 13)

On December 19, 1957, Barter Motors entered into a Retail Dealer Agreement with Supertest under which Barter Motors undertook to deal in no other petroleum products than those supplied by Supertest for a ten-year period. This agreement contains, inter alia, the following provision:

> "5. The Company agrees that said products will be supplied to the Dealer at the Company's current tank wagon price to Dealers prevailing at the Dealer's place of business, at time of delivery, . . ."

(Exhibit S-1)

However, a letter dated January 27, 1958, addressed to Mr. William J. Barter and signed by Mr. S.H. Marshall, then Divisional Sales Manager of Supertest for the Toronto area, reads as follows:

"CONFIDENTIAL

Mr. William J. Barter,
T/A Bill Barter Motors,
1651 Wilson Avenue,
DOWNSVIEW, Ontario.

Dear Sir:

This letter will serve to confirm our mutual understanding whereby during the term of your supply agreement dated December 19, 1957, Supertest agrees to supply you with your gasoline requirements at the recognized Dealer Tank Wagon price prevailing at time and place of delivery less a discount of 2¢ per gallon.

The discount to be made available to you in cheque form the fifteenth of the month following that in which deliveries are made.

It is further understood when and if paving advance of $5,000.00 is made by Supertest 1¢ of the previously mentioned discount will be retained by Supertest until such time this paving advance is repaid in full.

Yours very truly,

SUPERTEST PETROLEUM CORPORATION LIMITED,

'S. H. Marshall',

S.H. Marshall,
Divisional Sales Manager"

SHM/KED

(Exhibit S-1)

According to Messrs. W.J. Barter and S.H. Marshall, the two cents per gallon discount referred to in the above letter was not deducted from the invoice at the time of the delivery of gasoline, but was paid once a month by cheque (Evidence, pp. 6-7; Hearing, pp. 19-20). Tied in to the above arrangements was a covenant dated January 17, 1958. Under this covenant, Supertest agreed to advance the sum of $5,000 to Mr. W.J. Barter to enable the latter to improve the premises at 1655 Wilson Avenue, more particularly to pave the driveways and approaches. This sum of money was to be repaid on the basis of one cent per gallon of gasoline purchased by Barter

Motors from Supertest. No provision was made for the payment of any interest. However, according to the evidence of Mr. W.J.Barter, no advances were made under this covenant.

With respect to the circumstances which led to the above arrangements, Mr. S.H. Marshall gave the following evidence:

BY MR. MITCHELL:

"Q. In your experience as the Toronto divisional sales manager, is there or is there not a need for increased outlets to serve that area?

A. Yes, that is right, there is. We - I do personally, apart from the staff take an interest in the growth with a view to increasing our representation, we have to keep abreast of the expansion in Toronto and as a result I can speak with certain authority and we were examining that area around Jane to find a suitable site for service stations.

Q. That brings us to the Barter outlet. How did we first acquire an interest in the Barter outlet?

A. I think the wholesale sales manager by the name of W.E. Marshall did advise me that he had seen what looked like a new automobile dealership going up on Wilson Avenue. So I went out myself and took a look at it and asked Mr. Marshall to get the full particulars from Mr. Barter or whoever was in charge there and let me know. As a result he gave quite a brief rundown, that they were making a tentative deal with a competitor which led to me going out personally and opening negotiations with Bill Barter.

Q. Was any company identified, any petroleum or marketing company identified on the location?

A. Yes, when I went on the property there was a sign there advertising the name and franchise for another product and as part of that sign it had 'City [sic-Cities] Service'. I cannot tell you exactly what it said but something like 'City Service products will be handled here'. It was identified with the City Service Oil Company.

Q. Then you entered into discussions, did you, with Mr. Barter?

A. Yes, he had made tentative arrangements with City Service but nothing had been signed and his negotiations had dragged on to the point that he had to have action with[in] 48 hours. He was in the process of pouring the floor in the back part of the building and he wanted to install hoists and before you pour your floor you really have to go ahead with your hoist installation at that time. He was holding up his contractor and the idea was that if I could make a deal with him and give him an answer within 48 hours he would come with us and he had given me his word he would switch.

Q. Had you any idea of the nature of the deal that had been proposed by City Service?

A. That was difficult. I never did get the firm facts from him. In our negotiations anything that I was prepared to offer it seemed that I was offending Mr. Barter and he was looking for a great deal more and felt that to [sic] his deal with City Service was such that maybe he could take the loss on the delay and still hang out for the deal with City Service which indicated it was a pretty much better deal than anything I could discuss with him. But as in all our conversations he said that if I could give him an answer within 48 hours that he would do a deal with us.

I mentioned there was another factor here which kind of prodded me at the same time. We had received a letter in January 1957 from Metropolitan Toronto advising that they were taking a preliminary study of this corner of Jane and Wilson and that our property would be involved and would be expropriated almost any time.

Q. That is the Hearl location?

A. Yes, and it was also a factor, I think."

(Hearing, pp. 7-9)

BY MR. QUINLAN:

"Q. When you were discussing your negotiations with Mr. Barter you made some remarks that this was not a normal dealer outlet where Barter was located?

A. Not a normal service station outlet.

Q. And it did not lend itself to proper service station operations, I think those were your words?

A. That is right.

Q, But nonetheless Supertest was anxious to obtain this location for an outlet for its petroleum products?

A. That is right.

Q. And was prepared to give Mr. Barter or his firm this additional discount in order to obtain it?

A. Yes. I should qualify that. We were prepared to give it to him and that is the cheapest way to secure representation.

Q. In other words, an independent outlet is a more remunerative operation for the company than the leased outlet under most circumstances?

A. Under most circumstances."

(Hearing, pp. 24-25)

From this evidence, it may be inferred that as an independent gasoline outlet, Barter Motors was in an excellent bargaining position in dealing with possible suppliers.

CHAPTER III

SUPERTEST PRICING POLICIES

1. Temporary Local Competitive Assistance

While Supertest did sell premium and regular gasoline to Mr. Hearl at the tank wagon price, it regularly sold the same gasoline to Barter Motors two cents per gallon cheaper under the discount arrangement of January 27, 1958. This situation was modified during the price war which took place in the retail gasoline trade between late April and late July 1959 in the metropolitan Toronto area. The change was brought about by the granting by Supertest to Mr. Hearl, but not to Barter Motors, of temporary local competitive allowances.

With respect to these allowances, Mr. S. H. Marshall gave the following evidence:

BY MR. MITCHELL:

"Q. Mr. Marshall, from your experience with Supertest have we instigated or led any what are called gasoline price wars?

A. No, never at any time. As a matter of fact to the contrary. We were generally, based on personal experience and knowledge, the last in a price disturbance and I think Mr. Hearl called the writer three times personally asking for assistance before I had factual confirmation that our competitors were helping their dealers in that general Jane and Wilson area.

Q. So that in this particular case is it correct to say that the assistance which we ultimately provided to Hearl was not provided as soon as his competitors may have received it?

A. It was not provided as soon as his competitors received it.

Q. Are there any other specific circumstances which you can describe to the Commission of a similar nature?

A. Yes. In the Markham-Unionville area two of our competitors had been cutting the price two cents below

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us for about six months and we had proof that they had been helping the dealers before we became competitive. That is one of many. I can take you through various tank wagon zone areas right through to Sault Ste. Marie and prove by a long record that our dealers have been generally the last to be assisted in every area including North Bay, Sturgeon Falls, Sudbury and Sault Ste. Marie.

. . .

Q. To return to TLCA again, Mr. Marshall, what is TLCA?

A. Temporary Local Competitive Assistance is a form of grant that we make available to our dealer in times of price distress so that they can keep their doors open for business and provide a living for their families. We have endeavoured to make known or we have proven that a man must have, I believe, five cents a gallon in order to break even."

(Hearing, pp. 20-22)

The basis on which TLCA was granted is described as follows in Mr. Hearl's evidence:

BY MR. QUINLAN:

"Q. Are you paying for your gasoline as you get it?

A. Yes.

Q. And is the company setting your retail price?

A. Well, I cannot change it. I cannot lower it.

Q. You cannot lower it?

A. No -- not without losing my rebate. So I would assume that they are setting the price.

Q. You say you cannot lower your price without losing your rebate. Now, whom did you get that information from?

A. This was general instructions after the last gasoline war . . . .

. . .

Q. And then you got into the price war, and before going on consignment you got an allowance off the tank-wagon price,

as I understand it?

A. Yes.

Q. And was there any condition attached to the allowance at that time, so far as your gross margin was concerned?

A. There was a condition -- it was verbal -- that you definitely would not cut below the prevailing cut price.

Q. In other words, there was a condition on how far you could go down?

A. Yes. You could go down, but just to the prevailing cut price.

Q Was there any maximum that you could not exceed?

A. I would say not. If you had wanted to sell gasoline at the regular price, which was 43.9 before the price war, you could have continued to do so.

Q. With the allowance?

A. With no allowance.

Q. With no allowance?

A. That is right, with no allowance. The allowance was to meet competition.

Q. It was to meet competition?

A. Yes.

Q So that am I correct, then, in saying that if you did not meet competition you did not get the allowance?

A. That is right."

(Evidence, pp. 16-18)

This testimony is corroborated by the evidence given by Mr. W.J. Barter, to whom TLCA was offered, but who declined it:

BY MR. QUINLAN:

"Q. Did I understand you to say that they said they would

subsidize you to the extent of five cents a gallon, and that if you met the competitive price they would allow you a gross margin of five cents over what you paid them; is that correct?

A. Well, supposing gasoline dropped to 25 cents a gallon, I would then be buying it at 20 cents a gallon.

Q. But that was the condition, was it -- that you could not go any higher?

A. If I did that I was controlled by Supertest as to the price I would have to charge for my gasoline. In other words, they were setting the price of the gasoline, and I had to follow suit. I did not want to get involved in this rat race that was going on at that time, so I stayed out of it entirely, and just maintained my price of 39.9 at which I had been selling right along."

(Evidence, p. 8)

With respect to this matter, the evidence given by Mr. S. H. Marshall is somewhat different. According to him, TLCA was available in the same amounts to all dealers who had previously decided to meet competition and it was entirely up to them whether or not they would go below the going price. Here are some excerpts of his evidence:

BY MR. MITCHELL:

"Q. Does it have the effect of fixing the price?

A None whatsoever, no.

Q. Why?

A The dealers set their own prices and usually our own dealers set it in keeping with that posted by their competition. Then they come to us and ask us to help them out with sufficient TLCA to make a living, to stay in business.

Q. In other words, it follows the event, is that correct?

A. That is correct, it is the result of an event."

(Hearing, p. 22)

BY MR. QUINLAN:

"Q. What was the proposition first of all put up to the dealer when he wanted the TLCA?

A. There was no proposition put to the dealer. The dealer usually put the proposition to us and told us that he wanted to lower his price in keeping with local competition and would ask if we would give him subsidy or TLCA to allow him to make sufficient profit to remain in business.

Q. Was it meant to insure that he would meet competition?

A. It was entirely up to him.

Q. He didn't have to meet competition?

A. Not as far as I am concerned.

Q. Was that information given to Mr. Barter as well?

A. Given to all dealers.

Q. How was it given?

A. Through word of mouth, through our sales supervisors.

Q. It is a word passed around about TLCA being available. How do you know what price he wants to sell it at?

A. He tells us what price he wants to sell it at.

Q. And that is taken solely on the word of the dealer?

A. Well, whatever price he sets as long as it is in the general area of what the rest of the people are selling. We try to give him sufficient margin.

. . .

Q And if he wants to lower his price below what the going price is in the area do you still allow him a margin?

A. A margin based on the going price in the area.

Q. So it is based on the going price in the area, not that he is free to pick any price he wants?

A. We would not assist a dealer to disrupt the price situation or to cause a price situation, no.

Q. What I am getting at is you are setting a maximum at which he can sell?

A. We are not setting the price in any way at all.

Q. Well, surely there is some understanding here. I cannot follow this. You say if he was going to disrupt he would not get the TLCA?

A He will get the TLCA to the going price in the neighbourhood.

Q. To the going price?

A. That is right.

Q. And if he goes below that, that is up to him?

A. That is entirely up to him.

Q. And if he wants to go higher than that?

A. That is entirely up to him.

Q. But he will still get the TLCA at the going price?

A That is right.

Q. And that is definitely made known to the dealer?

A. It has been told to them.

Q Have you any idea how two separate dealers - admittedly their evidence is as to very different amounts but each dealer seems to be under the impression that there was a maximum gross margin they could get?

A. I don't think that was ever explained to them, sir.

. . .

Q. As far as Barter Motors is concerned, if he had accepted the TLCA on the basis on which it was given and at one stage it was down to 10.4, in that case he would have received 8.4 had he met the going price, is that correct?

A. That is correct.

Q. Could he still have received it had he wanted to continue selling on at the higher price he was then on?

A. That was his decision.

Q He would get it in any event?

A. That is right, we offered it to any of them.

Q. And that was made clear to him, that he could continue to sell at 37.9 if he wanted and he would still get eight to ten a gallon?

A. It is pretty hard to tie this down, Mr. Quinlan. All I can do is simply advise the dealers what we are prepared to do. If he wants to be competitive we will give him TLCA. If he does not wish to be competitive there is no reason why we should pay it. He sets his price and if TLCA is not necessary then it is not paid.

Q. But that is the point, if it is not competition you are not going to pay the TLCA; in other words, it is not offered to him 'here it is, you do what you want'?

A. No, he makes his decision and then we ask him afterwards.

Q. In other words, you are saying; 'Meet the going price', in other words, 'Don't go higher than that price. What you do is up to you if you are going to get TLCA'?

A We would not put it that way.

Q. Then how would you put it?

A. I think I can best exemplify it with Mr. Hearl. Mr. Hearl said he wanted to meet the price of Shell and Texaco and he wanted to know what assistance he would get and we told him and he said: 'Fine, I want to put my price down'. All the dealers were told if they wanted to meet the local price we would pay them TLCA in keeping with the going price.

Q. That is, if they met the price?

A. If they wanted to meet the price we would assist them.

Q. What did you mean by meeting local competition, how far would that extend?

A That is the immediate major competitors."

(Hearing, pp. 29-34)

In his evidence, Mr. Barter explained why he declined TLCA as follows:

BY MR. QUINLAN:

"Q. . . . Then you said that during this price war you reduced your price two cents at the beginning. Did you receive any other assistance from Supertest?

A No.

Q Did you ask for any?

A No.

Q And none was offered?

A Yes, it was offered.

Q. It was offered?

A Yes.

Q What offer was made, and what were the conditions?

A. They would subsidize us -- I think that is the way they put it, if I remember correctly, to the extent of five cents a gallon, in order that we could meet the competition which I think dropped down as low as 20 some odd cents a gallon -- 22 or 23 cents a gallon. But I thought I might lose the advantage I had of this, [the two cent per gallon discount referred to] when the thing straightened itself up. So I did not want to be beholden to the company for any other concession than what we had had."

(Evidence, pp. 7-8)

Mr. Barter's fear of losing the two per cent discount was unwarranted according to Mr. S. H. Marshall's evidence:

BY MR. MITCHELL:

"Q. Was TLCA offered to Mr. Barter?

A. Yes, it was.

Q. Did he accept it?

A. He did not.

Q. Do you know why he did not?

A. In his words to me he was quite emphatic and said he was going to mind his own business, he was not going to become involved with the rest of the damned fools and get tied up with the rat race, as he called it. He was going to go his own sweet way, they could do what they wanted to.

Q. In evidence Mr. Barter indicated - I am not sure I can find it quickly but he indicated that if he had accepted - page eight and nine - Mr. Barter indicated that if he had accepted TLCA he would have lost his discount. Now, is that correct?

A. He would not have lost his discount as such but in a case of an independent who is living on commission as in the case of Mr. Barter and where we are required to make available TLCA we endeavour to make a deal with that party whereby the total amount given will not be in excess of the TLCA given any other dealer in that area. I can illustrate it by saying that if TLCA was 2.5 cents and the commission was two cents Mr. Barter would continue to receive his commission of two cents but would get TLCA of .5cents.

Q. What would happen to the discount after normal marketing conditions had been restored?

A. Would you repeat that?

Q. What would happen to the discount after normal marketing conditions had been restored?

A. It would continue to be paid to him as prior.

Q. In other words, the acceptance of TLCA then had no bearing on the discount?

A. None whatsoever."

(Hearing, pp. 22-23)

BY MR. QUINLAN:

"Q. Now, if we can turn to the question of TLCA there was one part that I was not quite clear on from the figures you gave when you were talking about Mr. Barter's situation, an independent who was getting a discount or, you referred to it as a commission of two cents and TLCA came in. As I understood the example you gave you said that therefore the TLCA was .5 cents?

A. 2.5 cents.

Q. In other words, if it was 2.5 cents what would Mr. Barter get had he come in under the TLCA?

A. We would ask Mr. Barter to go along with total commission and TLCA in the same amount of TLCA that was given any Supertest dealer in that area; in other words, if he continued to receive his two cents commission his TLCA would be .5 cents but that is a dealer's choice.

Q. If it went to five cents he would get two cents plus three cents?

A Yes."

(Hearing, pp. 28-29)

It is clear from the evidence that TLCA was available to Mr. Barter under the same conditions as it was to Mr. Hearl. It was declined by the former for his own reasons, and particularly because he thought he might not continue to receive the special discount from Supertest after TLCA was withdrawn.

TLCA was not granted off the face of the invoice, but was paid by cheque after a weekly meter reading (Return of Information; Hearing, pp. 19, 29).

2. <u>Prices and Quantities of Gasoline Sold to Mr. Hearl and Barter Motors</u>

Table 1 shows monthly sales of gasoline, whether premium or regular, to Mr. Hearl and Barter Motors respectively by Supertest.

Table 1

Quantities of Gasoline Delivered to Mr. Hearl and Barter Motors, by Months, 1956-60

Dealer	Mr. Hearl					Barter Motors		
Year	1956	1957	1958	1959	1960	1958	1959	1960
January	(1)	21,100	21,050	21,050	25,000	8,775	36,200	19,700
February		15,850	25,200	15,850	26,400		27,500	21,150
March		15,850	21,050	19,800	26,100		34,725	21,450
April		19,950	23,200	21,150	33,550		20,825	9,450
May		21,050	23,950	32,400		4,600	38,550	
June		25,650	22,850	41,850			25,250	
July		21,100	30,500	42,350		16,800	11,100	
August		24,300	24,450	28,250		19,550	28,100	
September		15,800	24,100	28,900		16,300	32,200	
October		21,050	25,850	25,150		6,300	31,500	
November		14,750	21,050	25,400		22,000	28,200	
December	21,100	21,050	27,300	27,900		31,485	28,300	
TOTAL	229,262	237,500	290,550	330,050	111,050	125,810	342,450	71,750

(1) Monthly figures not available for January to November 1956.

Source: Exhibits H-4 and H-5.

From this table, it appears that deliveries to Barter Motors were infrequent up to July 1958 and at a considerably lower level than those to Mr. Hearl up to October 1958. However, from November 1958 to December 1959, monthly sales to Barter Motors exceeded those to Mr. Hearl, except for April, June, July and August 1959. The cumulative totals of sales to Barter Motors and Mr. Hearl for the entire year 1959 were much the same. In 1958 and 1959, total deliveries to Mr. Hearl show an increase over the previous year and figures for the first four months indicate the same upward trend in 1960. Throughout these 2 1/3 years, the only months for which sales to Mr. Hearl failed to exceed those for the corresponding month of the previous years were January and June 1958, January, February, March, April and October 1959.

The fact that deliveries to Mr. Hearl went on rising even after Barter Motors started in business in December 1957 appears to have been related to the development of the area in which both outlets were situated. In his evidence, Mr. S. H. Marshall stated that since 1953, five new gasoline retail outlets had been erected in the Downsview area, the last one being Barter Motors (Hearing, pp. 6-7). However, sales to Mr. Hearl after declining from 263,295 gallons in 1953 to 229,262 gallons in 1956 rose to 290,550 gallons in 1958 and to 330,050 gallons in 1959 (Exhibit H-5). It would seem that the increase in the number of retail outlets was more than outweighed by the population growth and economic development that took place in the Downsview area. In this respect, Mr. Marshall's evidence included the following:

BY MR. MITCHELL:

"Q. . . . can you describe to the Commission what, if any, growth has taken place in this area?

A. During the past five years there has been exceptional growth in this immediate vicinity particularly along the north side of Wilson Avenue and north on Jane Street from this intersection. As a matter of fact residential and light commercial has increased the population very tremendously. I don't know those figures but the rate of growth has been exceptional in that particular area."

(Hearing, p. 6)

Table 2, based on the return of information of the Secretary of Supertest, shows, for the period of March 18 to July 25, 1959, the respective prices and quantities of premium and regular gasoline sold to Mr. Hearl and Barter Motors, the dates of the various deliveries and finally the amounts of the allowances granted to Mr. Hearl.

Table 2

Premium and Regular Grades of Gasoline Sold to
Barter Motors and Mr. Hearl, March 18 to July 25, 1959

Date	Premium gasoline sold to					Regular gasoline sold to				
	Barter Motors		Hearl			Barter Motors		Hearl		
	Gals.	Price per gal. ¢	Gals.	Price per gal. ¢	TLCA per gal. ¢	Gals.	Price per gal. ¢	Gals.	Price per gal. ¢	TLCA per gal. ¢
March										
18	500	38.3				3,450	33.8			
20			1,100	40.3				3,200	35.8	
21						4,200	33.8			
25						3,575	33.1			
28			1,100	40.1				3,900	35.1	
30	500	38.1				4,800	33.1			
Total	1,000		2,200			16,025		7,100		
April										
3						3,500	33.1			
6			650	40.1				4,650	35.1	
8						4,200	33.1			
11						4,200	33.3			
14			1,900	40.3				3,350	35.3	
15	500	38.3				2,325	33.3			
21	900	38.3	1,200	40.3		5,200	33.3	4,100	35.3	
28			650	40.3				4,650	29.65	5.65
Total	1,400		4,400			19,425		16,750		
May										
2								4,200	29.65	5.65
8			900	40.3		5,000	33.3	4,200	35.3	
12			500	40.3		4,200	33.3	4,300	35.3	
15	500	38.3				4,750	33.3			
16			650	40.3		2,250	33.3	4,000	35.3	
21			700	40.3				3,500	35.3	
22						5,300	33.3			
25	650	38.3	600	40.3		4,650	33.3	4,650	35.3	
27						4,000	33.3			
29						5,250	33.3			
30			600	40.3		2,000	33.3	3,600	35.3	
Total	1,150		3,950			37,400		28,450		

Table 2 (continued)

Date	Premium gasoline sold to					Regular gasoline sold to				
	Barter Motors		Hearl			Barter Motors		Hearl		
	Gals.	Price per gal. ¢	Gals.	Price per gal. ¢	TLCA per gal. ¢	Gals.	Price per gal. ¢	Gals.	Price per gal. ¢	TLCA per gal. ¢
June										
1						4,200	33.3			
4			650	40.3		4,200	33.3	4,600	35.3	
5						4,300	33.3			
8			500	40.3		1,200	33.3	3,600	34.9	0.40
10						4,800	33.3			
12						5,250	33.3			
13			550	40.3				4,050	34.9	0.40
15						1,300	33.3			
16			600	40.3				4,400	30.4	4.90
18								3,950	30.4	4.90
20								3,200	30.4	4.90
22								3,400	30.4	4.90
24			500	40.3				3,100	30.4	4.90
26			650	40.3				4,000	30.4	4.90
29								4,100	30.4	4.90
Total			3,450			25,250		38,400		
July										
2								4,100	30.4	4.90
4								550	30.4	4.90
6			1,100	40.3				4,200	30.4	4.90
8	1,000	38.3				800	33.3			
10								3,900	27.9	7.40
13			400	32.9	7.40			4,100	27.9	7.40
17								4,200	27.9	7.40
20								3,950	24.9	10.40
23			1,600	40.3				3,650	35.3	
25	900	38.3				4,100	33.3	1,100	35.3	
Total	1,900		3,100			4,900		29,750		
Cumulative Total	5,450		17,100			103,000		120,450		

Source: Supertest Return of Information.

Supertest's tank wagon prices of premium and regular gasoline declined at the end of March 1959. About mid-April there was a slight advance which brought them to 40.3¢ and 35.3¢ per gallon respectively. The net price of each delivery to Mr. Hearl can be arrived at by deducting from these tank wagon prices the amount of TLCA, if any.

With respect to premium gasoline, Mr. Hearl received only one temporary competitive allowance on one delivery of 400 gallons on July 13, 1959. It amounted to 7.4¢ per gallon which reduced his net purchase price for that delivery to 32.9¢ compared with a net price of 38.3¢ to Barter Motors which did not accept TLCA. Except for this one occasion, Barter Motors, as a result of its special 2¢ per gallon discount was charged a lower price for premium gasoline than Mr. Hearl throughout the period.

Except from April 28 to May 2 and June 16 to July 20, Barter Motors was also charged a lower price than Mr. Hearl for regular gasoline. However, the former's price advantage was reduced from 2¢ to 1.6¢ between June 8 and June 16 when the latter received a temporary competitive allowance of 0.4¢ per gallon. From April 28 to May 2 and June 16 to July 20, the price advantage shifted in favour of Mr. Hearl, since the allowance ranged from 4.9¢ to 10.4¢ and so exceeded the 2¢ discount received by Barter Motors.

From March 16 to July 25, Mr. Hearl sold a substantially greater gallonage of premium gasoline than Barter Motors. Conversely the latter sold a substantially greater gallonage of regular gasoline except in June and July at the peak of the price war. Throughout the period, individual deliveries to both dealers were for quantities substantially similar. Moreover it must be deduced from the evidence as a whole that TLCA, when granted to Mr. Hearl, was not conditional on the purchase by him of any given quantity of gasoline.

CHAPTER IV

RETAIL PRICES OF GASOLINE AT HEARL'S SERVICE STATION AND BARTER MOTORS

1. Before the Price War

According to the evidence given by Mr. S.H. Marshall (Hearing, p. 21), markups at the Supertest stations in the Downsview area ranged from 4.6¢ to 8.6¢ per gallon immediately prior to the period of the price war.

In his evidence, Mr. Hearl stated that his gross margins on premium and regular gasoline prior to the price war were 7.8¢ and 8.1¢ per gallon respectively (Evidence, pp. 17-18). On this basis his selling prices, in mid-April 1959, taking tank wagon prices of 40.3¢ and 35.3¢ per gallon, would have been 48.1¢ and 43.4¢ for the respective grades. However, according to his own evidence, he was then selling regular gasoline at 43.9¢ (Evidence, p. 18). As Mr. Marshall mentioned the same figure (Hearing, p. 21), the actual markup for regular gasoline seems to have been 8.6¢ per gallon. At Barter Motors, selling prices of premium and regular gasoline at that time were respectively 44.9¢ and 39.9¢ per gallon (Evidence, p. 6). With the tank wagon prices mentioned above less the 2¢ discount, the gross margins of Barter Motors were 6.6¢ on both grades. With respect to this matter, all the relevant information is summed up in Table 3.

Table 3

Retail Prices of Gasoline in Mid-April 1959

Dealer & Grades of Gasoline	Tank Wagon Price	Discount	Net Purchase Price	Markup	Selling Price
	- cents per gallon -				
Regular					
Mr. Hearl	35.3	-	35.3	8.6	43.9
Barter Motors	35.3	2	33.3	6.6	39.9
Premium					
Mr. Hearl	40.3	-	40.3	7.8	48.1
Barter Motors	40.3	2	38.3	6.6	44.9

Mr. Hearl said in evidence that he had approached Mr. Barter when he found that the latter was selling gasoline at 2¢ less than the prevailing price:

"A. . . .

. . . The dealership opened with Supertest products and selling gasoline at two cents less than the prevailing price.

First of all, the dealers in the area looked to me for an answer. I complained to my supervisor about it. It was understood by me, and not denied by the company, that he bought gasoline at two cents less than the tank-wagon price.

The name of the firm was Bill Barter Motors. Eventually I went over to see him and introduced myself, and said that gasoline was our bread and butter, and the mainstay of our business, and that if he had a car dealership it was probably his main business, and would he consider raising his price to the regular price, which I think was 43 or 44.

I pointed out that it was a hardship on us and it created ill-will, and that he could hardly expect us to buy parts from him, Ford parts.

The gentleman was very nice to me, and very polite, but the last words he said were, 'I think you should go back and check with Supertest, and you will find that I told them I was going to cut the price when they put it in here'."

(Evidence, p. 20)

On this matter, Mr. S.H. Marshall gave the following evidence:

BY MR. MITCHELL:

"Q. What price did Barter commence his gasoline sales at?

A. To the best of my knowledge, it was either 42.9 cents or 43.9 cents on grade two.

Q. How would that price compare with the prevailing prices in the area?

A. It was in keeping with the average retail price at that time.

Q. We have certain evidence before us that he was selling at a price two cents below the prevailing price. What do you have to say about that?

A. Mr. Barter did that, I believe, three or four or maybe five months after he opened for business and he did it, in his own words, to bring prospective customers onto the lot so that he could sell used cars and maybe automotive repairs.

. . .

Q. Mr. Marshall, did you have any conversation with Barter as to the price which he was going to sell the product to the public?

A. Never at any time was price mentioned. So far as retail sales were concerned.

Q. I read to you, Mr. Marshall, from the evidence of Mr. Barter [Hearl] at page 20 of the evidence as filed, the last paragraph and in fact the last sentence of the last paragraph:

> 'I think you should go back and check with Supertest and you will find that I told them I was going to cut the price should they put it in here.'

Have you a comment on that statement, Mr. Marshall?

A. My comment would be this, that it was certainly never said to me. As a matter of fact, I asked Bill Barter, since he was taking petroleum products as a secondary or fifth or sixth rate priority if he had any intention of disturbing the price and he said no, his business was automobiles, not the sale of gasoline and the reason I asked him at the time was that there had been disturbing factors and we did not wish to be a party to it if that was what he had in mind. Actually, if he had told me that he was going to cut prices I think I should have withdrawn from the negotiations."

(Hearing, pp. 11-13)

BY MR. QUINLAN:

"Q. Now, in discussing the question of prices when Mr. Barter opened up I believe you said there was no conversation and then I think you remarked that Mr. Barter had said that he had no intention of disrupting the prices and that your feeling was that if he had indicated he was going to you would have withdrawn from the negotiation?

A. I would have considered withdrawal if he had declared himself as being a disrupting factor in the market.

Q. Did you give him any indication that that was your feeling at the time?

A. I cannot recall he answered me directly. I did ask him if he had any intentions or what his intentions were in the sale of petroleum products and he said they were secondary. So therefore I had no reason to question him further."

(Hearing, pp. 25-26)

While Mr. Hearl's evidence was that Barter Motors had been selling gasoline at 2¢ less than the prevailing price, the situation in mid-April 1959, as shown by Table 3 was that the price of regular grade gasoline at Barter Motors was 4¢ per gallon lower than at Hearl's Service Station and 3.2¢ lower in the case of premium gasoline. In other words, Barter Motors reduced its selling prices not only to the extent of the 2¢ discount which it received but, in addition, had a lower markup than Mr. Hearl. From the evidence as a whole, it appears that Barter Motors was interested in securing the 2¢ discount in order to make its competitive position stronger in the sale of gasoline and used the discount not to increase its gross margin but to lower its selling prices.

2. During the Price War

With the advent of the price war in late April 1959, Barter Motors lowered its selling prices by 2¢ per gallon and thus reduced its gross margins by the same amount, as its cost from Supertest remained unchanged. Prices of gasoline at Barter Motors then became 37.9¢ for regular grade and 42.9¢ for premium grade which prices remained unchanged to the time Mr. Barter gave evidence. With respect to Mr.

Hearl's business, TLCA, whenever allowances were paid to him, resulted in a reduction in his gross margin but a greater reduction in retail prices. On this matter, Mr. Hearl gave the following evidence:

BY MR. QUINLAN:

"Q. Did you get any assistance from your supplier when you reduced your prices?

A. Our supplier, I think, was one of the last to offer rebates. Eventually we got one. And during the time the price was lowest, the price got down to 29.9.

Q. That is on regular gasoline, is it?

A. Yes, on regular gasoline. At that time, and just previous to the time that some of the stations closed up, we got a 4 1/4 cent rebate.

. . .

Q. When you started on consignment, or got the rebates from the company, did you request it or did the company come to you?

A. Oh, I would imagine that I requested it. Competition gets so keen, you just cannot sit and watch other companies facing you selling at 4 or 5 cents less than you do.

Q. And what margin were you allowed when you were getting these subsidies or rebate; what gross margin to yourself?

A. As I say, the gross margin at the lowest point, when it was sold for 29.9, was 4 1/4 cents on the regular gasoline."

(Evidence, pp. 13-14, 17)

If the lowest point to which the retail price of regular gasoline dropped was 29.9¢ and the gross margin was 4.25¢ per gallon, Mr. Hearl's net purchase price would then be 25.65¢. On the basis of Supertest's tank wagon price of 35.3¢ per gallon, the TLCA allowance would be 9.65¢. However, it seems that Mr. Hearl was in error as to either the amount of the gross margin secured under the

TLCA arrangement or as to the lowest point to which the retail price of regular gasoline dropped. According to the return of information from the Secretary of Supertest, at no time did TLCA paid to Mr. Hearl amount to the exact figure of 9.65¢ per gallon. The highest allowance was 10.4¢ on July 20, 1959. On this basis, the net purchase price would be 24.9¢. A markup of 4.25¢ would then result in a retail price of 29.15¢ per gallon.. Conversely a retail price of 29.9¢ would allow a gross margin of 5¢. As this markup was the amount which Mr. Barter understood was available with TLCA, it is most likely that the retail price was 29.9¢ with TLCA of 10.4¢.

On this basis, Mr. Hearl's selling prices during the periods when he was in receipt of TLCA would be as set out in Tables 4 and 5.

Table 4

Retail Prices of Regular Gasoline during the TLCA Periods

Dealer	Tank Wagon Price	TLCA or Discount	Net Purchase Price	Markup	Selling Price
	- cents per gallon -				
Mr. Hearl					
April 28-May 2	35.3	5.65	29.65	5.0	34.65
June 8-June 13	35.3	0.4	34.9	5.0	39.9
June 16-July 6	35.3	4.9	30.4	5.0	35.4
July 10-July 17	35.3	7.4	27.9	5.0	32.9
July 20	35.3	10.4	24.9	5.0	29.9
Barter Motors	35.3	2.0	33.3	4.6	37.9

Table 5

Retail Prices of Premium Gasoline on July 13, 1959

Dealer	Tank Wagon Price	TLCA or Discount	Net Purchase Price	Markup	Selling Price
	- cents per gallon -				
Mr. Hearl	40.3	7.4	32.9	5.0	37.9
Barter Motors	40.3	2.0	38.3	4.6	42.9

From these two tables, it appears that during the price war Barter Motors could not have met Mr. Hearl's prices of regular gasoline without selling at a markup of less than 2¢ from April 28 to May 2 and June 16 to July 6 and below cost from July 10 to July 20. With respect to premium gasoline, TLCA was paid to Mr. Hearl only on July 13, 1959 and his selling price was then 0.4¢ cheaper than Barter Motors' net purchase price.

3. After the Price War

As already indicated, Barter Motors maintained its markup at 4.6¢ per gallon on both premium and regular grades of gasoline up to the date of the taking of his oral evidence (Evidence, p. 6). However, Mr. Hearl's price set up changed a short time after the price war came to an end. His gross margins increased to 7¢ and 6.5¢ (Evidence, p. 14) and TLCA allowances paid to him were reduced to 2.4¢ and 1.9¢ per gallon (Evidence, p. 15) on premium and regular gasoline respectively. Mr. Hearl's selling prices were 39.9¢ per gallon for regular and, for premium, either 44¢ or 44.9¢ per gallon (Evidence, pp. 16, 21), presumably the latter since Mr. Hearl stated in his evidence that his net purchase price of premium gasoline was 37.9¢ (Evidence, p. 15). This information is summed up in Table 6.

Table 6

Retail Prices of Gasoline after the Price War

Dealer & Grades of Gasoline	Tank Wagon Price	TLCA or Discount	Net Purchase Price	Markup	Selling Price
		- cents per gallon -			
Regular					
Mr. Hearl	35.3	1.9	33.4	6.5	39.9
Barter Motors	35.3	2.0	33.3	4.6	37.9
Premium					
Mr. Hearl	40.3	2.4	37.9	7.0	44.9
Barter Motors	40.3	2.0	38.3	4.6	42.9

It appears from the table that, after the price war, Barter Motors' lower selling prices were due in large part, not to lower net purchase prices, but to smaller markups.

CHAPTER V

THE RELATIONSHIP BETWEEN BARTER MOTORS AND MR. HEARL'S BUSINESS

1. Proximity of Barter Motors and Hearl's Service Station

The retail outlets operated by Mr. Hearl and Barter Motors are both located on Wilson Avenue, near Jane Street, in the Downsview area of metropolitan Toronto. The distance between them has been estimated at 300 to 400 yards by Mr. Hearl (Evidence, p. 19) and at a quarter of a mile by Messrs. Barter (Evidence, p. 9) and S.H. Marshall (Hearing, p. 4).

Because of this proximity, the area from which each business derives gasoline customers overlaps the area served by the other. In this respect, Mr. Hearl's evidence is as follows:

BY MR. QUINLAN:

"Q. Approximately from what area do you draw your trade, at your station?

A. I am a suburban community. Twelve years ago there were only three farms across the road from me. Nowadays it is a real built-up area, with lots of apartments and it is altogether different. Twelve years ago I might have drawn five miles. Now I would say I draw from at least a mile and a quarter.

Q. A radius of a mile and a quarter from where you are located?

A. Yes."

(Evidence, pp. 18-19)

With respect to Barter Motors, Mr. Barter said:

BY MR. QUINLAN:

"Q. Now, approximately from what area do you draw your customers for the sale of gasoline?

A. I would say right in our immediate area, the Downsview area."

(Evidence, p. 9)

As Hearl's Service Station was situated on a corner while Barter Motors was not, the flow of traffic was not the same at the two locations. On this point, Mr. Johnston's evidence is as follows:

BY MR. QUINLAN:

"Q. Well, on what basis is the value -- for instance, I can envisage the location of a service station that might be very, very poor from a service station operation point of view but it might be a first class location from somebody else's point of view. Now, on what basis do you do your valuation there?

A. Well, volume of traffic is one of the major things. Traffic is the major. After that is the number of people that live in the area that can go back and forward for oil change, grease jobs and different things of that nature. Those are the two main assets so far as telling whether a station is properly located or not."

(Hearing, pp. 43-44)

BY MR. MITCHELL:

"Q. May I ask another question arising out of Mr. Quinlan's questioning on the question of traffic flow. Mr. Quinlan, I think, indicated that it appeared to him from your evidence that it appeared the traffic flow at these two locations was the same?

A. No, it is not the same. It is approximately 35 per cent less in front of Barter's or at least passing in both directions in front of Barter's than the point actually at Jane and Wilson."

(Hearing, p. 47)

2. Are Hearl's Service Station and Barter Motors Complementary?

Evidence was tendered to show that Barter Motors was complementary to, rather than competitive with, Mr. Hearl's business. Mr. S.H. Marshall said:

BY MR. MITCHELL:

"Q. Mr. Marshall, from your observation of those two outlets what would you have to say with respect to the effect of the opening of the Barter location on the Hearl location?

A. It was an asset to the Hearl location. It allowed us another representative in the area where there was a potential of many, many more customers almost daily and by having the name Supertest identified with it, having our products available we caused more people to know our company and our products and I think that reflected itself in Mr. Hearl's sales where, despite the extreme traffic congestion at the corner which tends to detract from sales after Mr. Barter comes on the scene his sales continue to increase. I would say that the name Supertest was becoming better known and it did assist the sales at the Hearl location."

(Hearing, pp. 23-24)

The following evidence was given by Mr. Johnston:

"Q. Mr. Johnston, what is your opinion as to the effect of the introduction of Barter Motors into this area on the Hearl location?

A. Whenever like companies or two locations of like companies, when the second one opens up in a district, the first one normally has a reduction in sales which is of a temporary nature and then later on the sales seem to lead back up again and go on. Now, it does help the supply company considerably in that the combined sales of the two places are frequently at least double what it was before the second one comes in and that is from past experience in various like situations.

Q. And what would you say as to the effect on Hearl or the general area if Barter had sold the products of another company?

A. Basically what happens whenever a new station opens up is that everyone and every company loses so much business. After all, he has to get it from some place. Had it been from another company Hearl could have been hurt just as much as he would have been with it being Supertest. Actually, it would have been about the same thing regardless of the company supplying the Barter location."

(Hearing, p. 41)

BY MR. QUINLAN:

"Q. Just one thing I want to be sure I understood correctly. When you said if a new service station came into this area it is immaterial in the long run whether, taking the Supertest dealer for example, it is immaterial for him whether it is the Supertest dealer or a dealer for any other company?

A. What I meant and tried to imply was that in the initial stage, shall I say, for the first six months to a year it actually does not matter which company goes in there, he is going to take it from all but if it is a like company then combined together they will do more business than if there were two locations that were one British America and one Imperial. If two like stations were in the area they would do more combined than if there was a separate supply.

Q. So that in the long run the advantage is actually to the dealer, the advantages to the company?

A. It is an advantage to both the dealer and to the company.

Q. I wonder if you would mind explaining that. You say if a new dealer comes in he is going to take business --

A. Yes, he is going to take business when he comes in but after a period of a few months all the other competitors in the neighbourhood, their business will level out over a period of a short time. That is due to the additional consumption of gasoline in every year and different other things so their business

will start on the uprise after approximately
a year's time.

With it being a like company for two locations the combined advertising will help both places more than what it would being separate suppliers."

(Hearing, pp. 44-45)

BY MR. MITCHELL:

"Q. You were comparing the sales that would result from two given locations in a given area and it was my understanding that you had said that the combined sales of those two outlets would be greater if they were one brand than would be the combined sales of those two outlets if they were different brands?

A. That is right.

Q. Is it correct to say that one of the things that might contribute to that circumstance would be the enlarging of what the advertising people call the corporate image in the area?

A. That has a big bearing on it. Without citing examples there are some places where some companies are very, very strong and they tend to do practically all the business. It happens so frequently it seems to be against all common sense but it is an actual fact."

(Hearing, p. 47)

BY MR. WHITELEY:

"Q. Mr. Johnston, I am interested in this principle you are developing that the duplication of outlets results in more than doubling the volume of business. Are you taking into account the growth in sales that has occurred?

A. Oh, yes, that is what is implied, sir. If you open up a station here and you immediately open up another station right alongside it in an area that cannot expand or cannot draw off more traffic then the combined sales would not be larger because

after all there is only so much gasoline that could be put into any group of automobiles.

Q. So using a figure of more than double you are not taking into account what growth the single station may have had in the same period?

A. What you have in a lot of locations is due to traffic it can come up to a certain level on account of the traffic passing by the location but it cannot draw much more in off the street, shall we say, but if there [is] another opening down the street further it too can draw more in. You see, the traffic in this particular area is really fantastic. It would be about the second or third largest traffic artery, I guess, in Metropolitan Toronto. So unless you had a really large and long property where everyone that wanted to buy their gasoline could come in bumper to bumper you just could not handle any more than a given number of cars at the one time. That is where the extra sales of gasoline come in in the district."

(Hearing, p. 48)

The evidence cannot be taken as conclusive that, by virtue of their proximity, Mr. Hearl's business and Barter Motors sell more gasoline together than they would if they were supplied by different companies but it is possible that in some way they may complement each other in the sale of Supertest gasoline. At the same time each is seeking to develop his own trade and to the extent that both businesses are seeking to serve the same customers, they are in competition with each other.

3. The Competitive Relationship between Mr. Hearl and Barter Motors

While Mr. Hearl operates a standard service station business, Barter Motors is primarily an automobile sales agency and, subsidiarily only, a dealer in petroleum products. However, in the same way that a department store may be in competition with a specialty store with respect to a specific article, Barter Motors and Mr. Hearl are in a competitive relationship with respect to the sale of gasoline, if each could draw customers from the other.

On that point, Mr. Hearl gave the following evidence:

BY MR. QUINLAN:

"Q. Did you find that during the price war, or before and after the price war, you lost business to him? [Barter Motors]

A. Oh, definitely yes. This occasion was probably a little previous to the general price drop. How much is hard to say. In twelve years I have had a small increase in volume each year.

Q. Yes?

A. So it is hard to say how much you lose. If it is a question of seeing people that dealt with me, over there -- yes, then, I see them. But it is hard to say how much you lose. My gallonage at that time was averaging over 20,000 a month, and it dropped below 20,000 a month. His gallonage, from nothing, went up to 30,000.

. . .

Q. Did you find that you were pulling business away from him when you were at 29.9?

A. Yes, definitely; because, as I say, from an average of 20,000, or a little over, we jumped one month to 42,000."

(Evidence, pp. 21-22)

With respect to the same matter, Mr. S.H. Marshall's evidence included the following:

BY MR. QUINLAN:

"Q. When you were talking about the location of outlets I think your remark was that Hearl's was the choicest location in the area?

A. In my opinion it is.

Q. In looking at this map or sketch, Exhibit H-3 I notice that in Hearl's case he has got two lines of traffic, in other words, taking it at the worst northbound on Jane and eastbound on Wilson, is that correct?

A. Yes.

Q. Whereas Barter Motors, taking it at the worst, has just eastbound traffic on Wilson?

A. That is correct.

Q. Yet I notice on Exhibit H-4 and H-5 where we come to their sales that when you get to 1959 Barter takes more deliveries than Hearl does. In 1958 it was much lower but in 1959 I see he exceeds Hearl?

A. Yes.

Q. What would the explanation be for that if the other one was the choice location?

A. He was selling at a lesser price."

(Hearing, pp. 26-27)

Mr. Barter said in evidence:

BY MR. QUINLAN:

"Q. And are there any other Supertest stations relatively near to your station?

A. A quarter of a mile, the corner of Jane and Wilson.

Q. Whose station would that be?

A. Jim Hearl.

Q. Were his prices higher, or the same, or lower?

A. Lower. He went down as low as they went -- whatever price they bottomed at. I don't know what it was.

Q. Did you lose gasoline business to him?

A. Yes. We just dried right up.

Q. You did?

A. Yes.

Q. At what stage of the price war would that be, do you recall? Would it be right through?

A. Pretty well right through the situation. We were averaging, I think, about 1,200 gallons a day, and I think it dropped down to about 50 or 60 gallons a day.

Q. Do you know, for a fact, that you lost your customers to him?

A. To Mr. Hearl?

Q. Yes.

A. Oh no; I lost them to everybody, because they were all down.

Q. Do you know of any customer, specifically, that you lost to him?

A. No, you don't get to know your gasoline customers very well. And of course I am not in the gasoline end of the business myself. I am in the car business. That is my main object."

(Evidence, pp. 9-10)

If consideration is given only to the respective facilities of both retail outlets and the comparative advantages of their location, one would expect Barter Motors to sell less gasoline then Mr. Hearl. Table 1 shows just the opposite for 1959. In a great measure, this result is certainly due to the fact that Barter Motors charged lower prices throughout most of the year. Even without any direct evidence to that effect, it would be reasonable to assume that at least some of the customers who patronized Barter Motors in response to its lower prices would have been drawn from the neighbouring service station operated by Mr. Hearl. Such division of business would likely affect not only the sale of gasoline but also the sale of ancillary items and services which customers purchase at service stations when they bring their cars in for supply of gasoline. A comparison of the volume of business done by Mr. Hearl and Barter Motors in regular and premium grades of gasoline indicates that consumers of regular gasoline have been much more price conscious in their behaviour than buyers of premium gasoline.

Table 7 sets out the quantities of regular gasoline delivered to Mr. Hearl and Barter Motors in each price period between March 18 and July 25, 1959. It will be seen that the volume of gasoline

handled in each period is closely related to the price position of the dealer. When the price at Barter Motors was lower than that charged by Mr. Hearl the gallonage handled by the former tended to exceed that handled by the latter. When Mr. Hearl had the lower price his gallonage tended to be greater than that of Barter Motors. While both outlets would undoubtedly be affected by actions taken by other dealers in competition with them. it must be concluded that Mr. Hearl and Barter Motors were in direct competition and that their trade was affected by the relative prices at each outlet.

With respect to premium gasoline, the relationship of gallonage to price does not appear as direct as in the case of regular gasoline. Throughout the period covered by Table 7 Mr. Hearl sold a substantially greater gallonage of premium gasoline than did Barter Motors. Yet, except for 400 gallons delivered to him on July 13, Mr. Hearl's selling price of premium gasoline was 3.2¢ to 5.2¢ per gallon higher than that of Barter Motors.

Table 7

Deliveries of Regular Gasoline to Barter Motors and Mr. Hearl and Differences in Retail Prices Charged by Both Outlets for Such Gasoline

Date	Deliveries to		Price
	Barter Motors (gallons)	Mr. Hearl (gallons)	differentials (¢ per gallon) *
March 18 - April 21	35,450	19,200	-4
April 28 - May 2	-	8,850	+3.25
May 8 - June 5	50,100	28,850	-6
June 8 - June 15	12,550	7,650	-2
June 16 - July 8	800	35,000	+2.5
July 10 - July 17	-	12,200	+5
July 20	-	3,950	+8
July 23 - July 25	4,100	4,750	-6
Total	103,000	120,450	

* A minus sign (-) indicates that the price charged by Barter Motors was lower then the price charged by Mr. Hearl by the amount shown. A plus sign (+) indicates the reverse situation.

Source: Supertest Return of Information.

CHAPTER VI

CONCLUSIONS AND RECOMMENDATIONS

1. Availability of Temporary Local Competitive Assistance

The allowance granted to Mr. Hearl by Supertest in the form of temporary local competitive assistance was not part of the normal pricing system of the Company but was a temporary expedient to enable one or more of its customers to meet an immediate and local competitive situation of a severe character. We have already expressed the conclusion that the allowance in the form of TLCA was available to Barter Motors on the same conditions as were applicable to Mr. Hearl. In the circumstances we do not consider the fact that Barter Motors was unwilling to apply for TLCA in the same way as Mr. Hearl and, therefore, did not receive the allowance gave rise to a practice of discriminating in price between these two customers on the part of Supertest.

2. The Special Allowance Given by Supertest to Barter Motors

Supertest advanced a number of reasons to explain the sale of gasoline to Barter Motors at a lower price than that normally charged Mr. Hearl. One argument which was advanced and which has been considered was that the gasoline outlets operated by Barter Motors and Mr. Hearl were complementary to each other rather than competitive. We have already given the reasons why we consider that Barter Motors and Mr. Hearl were competitors in the sale of gasoline.

Certain exhibits were filed and oral evidence was adduced on behalf of Supertest in support of the proposition that the price concession granted to Barter Motors was not a discriminatory action against Mr. Hearl because of the difference in the cost to Supertest in dealing with the two stations. This proposition was based on the nature of the two outlets; that of Barter Motors being an independent station in which Supertest had an investment only in equipment, and that operated by Mr. Hearl being a company-owned station for which Mr. Hearl payed rent as a lessee.

Estimates of the costs of dealing with Barter Motors and Mr. Hearl, taking into account the property values and rental in the case of Mr. Hearl, were given by Supertest in Exhibits 8 and 9 which are reproduced in Tables 8 and 9. The comparisons are on the basis of cents per gallon and show a cost of 4.65¢ per gallon for 1958 in the case of Barter Motors and 6.96¢ per gallon for Mr. Hearl. For 1959, the cost is shown as 3.85¢ for Barter Motors and 6.50¢ for Mr. Hearl.

Table 8

Breakdown of Cost per Gallon of Gasoline
Delivered to Mr. Hearl
2151 Jane Street at Wilson, Downsview, Ontario

	1958		1959	
Gallons Delivered	290,550		330,050	
	Rate per gallon	Amount	Rate per gallon	Amount
EXPENSES				
Average operating expense in Toronto, based on cents per gallon of gasoline delivered - excluding Building Repair & Maintenance	@ 2.94¢	$8,542	@ 3.22¢	$10,628
Building Repair & Maintenance	.51	1,482	.37	1,221
Depreciation on Building @ 5%		836		836
Depreciation on Equipment @10%		472		472
Property Taxes		1,211		1,269
Insurance		28		28
6% Interest charge on valuation - Land & Buildings $168,000; Equipment 4,721; $172,721		10,363		10,363
Sub-Total		22,934		24,817
Less Rental Received		2,700		3,375
Estimated Total Expense		$20,234		$21,442
Cost per Gallon		6.96¢		6.50¢

Table 9

Breakdown of Cost per Gallon of Gasoline
Delivered to Barter Motors
1651 Wilson Avenue, Downsview, Ontario

	1958		1959	
Gallons Delivered	125,810*		324,450	
EXPENSES	Rate per gallon	Amount	Rate per gallon	Amount
Average operating expense in Toronto, based on cents per gallon of gasoline delivered - excluding Building Repair & Maintenance	@ 2.94¢	$3,699	@ 3.22¢	$11,027
Building Repair & Maintenance - applicable only to Company-owned Stations	-		-	
Depreciation on Equipment @ 15%		1,537		1,537
6% Return on estimated valuation - Equipment $10,245		615		615
Sub-Total		$5,853		$13,179
Cost per Gallon		4.65¢		3.85¢

* Part year only

As will be seen from the tables, the disparity between the estimated gallonage costs for the two stations is due to the charges attributed to the company-owned station operated by Mr. Hearl on the basis of the property valuations and the rental charged Mr. Hearl. It will be noted that the rental payments of $2,700 in 1958 and $3,375 in 1959 were less than the amounts shown for building repair and maintenance, depreciation, property taxes and insurance, without making any contribution to a return on investment.

No explanation was given of the basis on which the rental for the company-owned station was established, although an increase in rent from $225 to $300 a month was made apparently on April 1, 1959. It was suggested that the rental of $300 per month was a low rental for the service station property, particularly in view of the fact that the buildings contained living quarters and a restaurant which were sub-let at a total rental estimated at $210 per month, leaving $90 as the net rental of the service station proper from which tow truck and fuel oil businesses were also operated.

The following evidence as to the rental charged Mr. Hearl in comparison with the average rental of all company-owned stations in the Toronto area was given by Mr. S.H. Marshall:

BY MR. MITCHELL:

"Q. Mr. Marshall, can you give the Commission - I should perhaps ask you how much rent does Mr. Hearl pay to Supertest?

A. At the present time he is paying $300 a month but I believe, going by memory, that this took place in the middle of 1959. Prior to that time for the previous four years he was paying $225 a month.

Q. How does that compare with, let us say, the average return which Supertest receives throughout the Toronto area from company-owned locations?

A. On a rent per gallon the average in Toronto itself is 1.76 in the Supertest Petroleum stations and Mr. Hearl's rent gave us a return of only .93 cents in 1959.

Q. In considering that 1.76 cents does that include all stations, namely, those that have or have not facilities other than pumping facilities?

A. It includes all stations, Mr. Mitchell, for which we have direct documentation.

Q. So that would include stations which had no restaurant facilities and no living accommodation?

A. It would."

(Hearing, pp. 16-17)

Further evidence as to rates of rental for company-owned service stations and an opinion as to a proper rental for the property leased to Mr. Hearl were given by Mr. K.R. Johnston:

BY MR. MITCHELL:

"Q. Now, Mr. Johnston, let me put it to you another way. What would you consider the supplying company should receive as a fair and proper rental?

A. A fair and proper rental would be anywhere from one and three-quarters cents to two and a half cents a gallon.

Q. And on the basis of your valuation is there any other way in which you compute rentals?

A. Well, there is by taking a fixed rental which has been done in some cases where it is an established rental to assist the lessee until business has built up which is much lower than it normally is after the business has been built up. That is one method and the other method is on the value of the land plus the fixed costs and the other one is on a gallonage basis.

Q. What would you consider on the basis of the opinion which you have given to the Commission, what would you consider the proper rental to be?

A. I would say the rental at this place would be fair at anywhere from $550 to approximately $650 a month. That is taking into consideration the added facilities over the normal service station in that it has restaurant facilities and living quarters.

Q. Is there any percentage factor figures on investment that is used as a guide to rental of any type?

A. There actually is insofar as depreciation is concerned. Several companies use different methods but there is the depreciation on the equipment which usually takes anywhere from seven per cent to eight per cent and 7 1/2 per cent depreciation which must be charged completely to rental, and taxes and then there is the value of the building; in other words, the complete investment that the company has put in there other than equipment and that is usually approximately eight per cent.

Q. So that based on the eight per cent basis you would use the figure of eight per cent of $168,000 is that correct?

A. That is right."

(Hearing, pp. 38-39)

On the basis of a rental of $550 to $650 a month, the rate per gallon on 330,050 gallons supplied to Mr. Hearl would be about 2¢ to 2.3¢. The cost to Supertest on the basis of the charges set out in Table 8 would have been from 5.2¢ to 5.5¢. However, it will be seen from Table 8 that the largest item under charges is the 6 per cent interest charge on the valuation of land and buildings placed at $168,000. As the depreciation of 5 per cent on buildings is given as $836 the total value of buildings would be $16,720, so that the valuation of land would be $151,280. As the service station was erected originally in 1941 it would appear reasonable to conclude that the Company's investment in the property would differ considerably from the present valuation.

The Commission does not consider that the rate of rental which has been established for the service station operated by Mr. Hearl, whatever the basis on which it was negotiated, can be related to the comparative prices at which Barter Motors and Mr. Hearl were supplied with gasoline. The property charges and return on investment which are set out in Table 8 are not related to the cost of making a sale of gasoline but, rather, to the provision of service station facilities.

There is a further point which may be related to the disparity in costs per gallon between Barter Motors and Mr. Hearl as presented by Supertest. To the extent that gasoline business was gained by Barter Motors and lost by Mr. Hearl because of lower prices offered by Barter Motors as a result of the discount of 2¢ per gallon in its purchase price, the gallonage figures of the

two outlets would be affected. This would mean a lower gallonage rate for capital items in the case of Barter Motors and a higher gallonage rate for Mr. Hearl. In other words the disparity in costs per gallon between the two stations would be a factor, in part, of the discrimination in price in the purchase of gasoline. To the extent that the discrimination in price contributed to the disparity in costs it would have to be regarded as a consequence rather than a cause of the discrimination.

Another ground advanced by Supertest in explanation of the special allowance given to Barter Motors was that the Company's action was necessary to secure the business of Barter Motors in the face of a competitive offer by at least one competing oil company. The evidence in the inquiry does not include any particulars of the offer made by a competing oil company. Mr. S.H. Marshall gave evidence that when he approached Mr. Barter to become a Supertest dealer he learned that Mr. Barter was then negotiating with another oil company but had not reached an agreement.

The meeting of spot competition has generally been regarded as not establishing a system of pricing which would amount to a practice when the only transaction is an isolated sale. While it may be considered that only one contract was made between Supertest and Barter Motors it had the effect of establishing a discount on the price of each sale of gasoline to Barter Motors for a ten-year period. In the circumstances in which Barter Motors was in competition with Mr. Hearl the granting of a discount of 2¢ per gallon to Barter Motors below the price normally charged Mr. Hearl resulted in a persistent discrimination in price against Mr. Hearl. In the opinion of the Commission the maintenance of a price differential of this character when two competitors are making purchases of the same kind must be regarded as a form of price discrimination on the part of Supertest against Mr. Hearl.

3. Recommendation

There have been no previous cases involving price discrimination which have resulted in judicial interpretation of former section 412. The language of the section and the price disparity between competing dealers which is disclosed by the facts in this inquiry support the conclusion that such situations can be dealt with under the legislation. It would appear that the discrimination in price existing between Barter Motors and Mr. Hearl would

be remedied by the discontinuance by Supertest of any difference in price in the sale of gasoline to the two competing dealers. In order to ensure this result the Commission recommends that a court order be sought under section 31(2) of the Act which would restrain Supertest from granting to Barter Motors any price advantage not offered to Mr. Hearl, subject to such conditions as the Court may see fit to impose.

(Sgd.) A. S. WHITELEY

Member

(Sgd.) PIERRE CARIGNAN

Member

Ottawa,
April 11, 1961